THE
MADRAS LAW JOURNAL.

II] NOVEMBER. [1950

THE RULE IN BASKERVILLE CASE AND ITS OPERATION.

The decision of the Central Court of Criminal Appeal in *Rex* v. *Baskerville*[1] has acquired importance not so much for the novelty of any principle enunciated there as for its authoritative restatement of the law relating to accomplice evidence. Statements were to be found in decided cases not all of which were reconcilable—*Rex* v. *Everest*[2], *Rex* v. *Wilson*[3]. The examination of the law in *Baskerville case*[1] was avowedly to set at rest all controversy and define the position for future guidance. Two recent decisions of the Judicial Committee—*Bhuboni Sahu* v. *The King*[4] and *Berng Griffith Lerotholi* v. *The King*[5]—have brought to the fore the operation of the rule laid down in *Baskerville case*[1].

In English law an accomplice has always been a competent witness. And a conviction based solely on the uncorroborated testimony of an accomplice is valid in law. In *King* v. *Atwood*[6], two persons had been convicted of highway robbery upon the uncorroborated testimony of an accomplice as to their identity. The question whether it would be legal to so convict was referred to twelve Judges who were unanimously of the opinion that an accomplice is a competent witness and if the jury weighing the probability of his testimony, think him worthy of belief, a conviction supported by such testimony alone would be legal. That was in December 1662. It has, however, been a rule of practice at Common Law for the Judge to warn the jury of the danger of convicting an accused on the uncorroborated testimony of an accomplice; at the same time the Judge should point out to the jury that it is within their legal province to convict upon such uncorroborated evidence, *Rex* v. *Stubbs*[7], In re *Meunier*[8]. The warning was being given *ex majori cautela*. Accomplice evidence is *prima facie* not entitled to credibility or weight. This is because the deponent is admittedly a party to the crime. Also he gives evidence in the hope or expectation of a pardon for himself. His credentials are thus poor though it may be that in particular cases there may be circumstances justifying belief in his evidence. There is a wide distinction between disbelieving evidence and determining that it is not legally sufficient if believed. Stephen neatly states the legal position thus[9]: "When the only proof against a person charged with a criminal offence is the evidence of an accomplice uncorroborated in any material particular, it is the duty of the Judge to warn the jury that it is unsafe to convict any person upon such evidence, though they have a legal right to do so." This cautionary rule has in England become hallowed by long practice. It has now become almost a rule of law, *Rex* v. *Baskerville*[1]. In the case of *Reg* v. *Farler*[10] it was observed by Lord Abinger: "It is a practice which deserves all the reverence of law for Judges uniformly to tell juries that they ought not to pay any respect to the testimony of an accomplice unless he is corroborated in some material circumstances." This cautionary rule of practice has been so

1. (1916) 2 K.B. 658 (C.C.A.).
2. (1909) 2 Cr. App. R. 130.
3. (1911) 6 Cr. App. R. 125.
4. (1949) 2 M.L.J. 194: L.R. 76 I.A. 147 (P.C.).
5. L.R. (1950) A.C. 11 (P.C.).
6. (1662) 1 Leach's Crown Cases 464.
7. (1855) 25 L.J. Reports, Magistrates' Cases 16.
8. (1894) 2 Q.B. 415.
9. Digest of the Law of Evidence, Art. 121.
10. (1837) 8 C. & P. 108.

invariably observed that it has been held that in the absence of such a warning the conviction is liable to be quashed—see *Rex* v. *Tate*[1].

The corroboration of the accomplice's evidence should relate not only to the circumstances of the crime but also to the identity of the accused. In *Rex* v. *Wilkes and Edward*[2], Mr. Baron Alderson observed : "You may legally convict on the evidence of an accomplice only if you can safely rely on his testimony, but I advise juries never to act on the evidence of an accomplice unless he is confirmed as to the particular person who is charged with the offence." A similar exposition was made by Mr. Baron Parke in *Rex* v. *Stubbs*[3], where he said : "My practice has always been to tell the jury not to convict the prisoner unless the evidence of the accomplice is confirmed not only as to the circumstances of the crime but also as to the person of the prisoner."

The confirmation should be as to a material circumstance of the crime and of the identity of the accused in relation to the crime. The rule has been thus stated[4] : "It is not sufficient to corroborate an accomplice as to the facts of the case generally. He should be corroborated as to some material fact or facts which go to prove that the prisoner was connected with the crime charged." In *Reg* v. *Farler*[5], Lord Abinger stated : "The evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it."

The corroboration need not be by direct evidence. It will suffice even if the corroborative testimony is in the form of circumstantial evidence, *Reg* v. *Birkett*[6] It was pointed out in *Rex* v. *Baskerville*[7] that in some cases, as for instance in cases of offences like misbehaviour with boys or other unnatural offences, it would be almost impossible to have direct evidence and so it would be unfair to exclude corroboration afforded by circumstantial evidence.

Where the evidence of an accomplice tends to incriminate more than one accused, corroboration must be forthcoming in regard to each of such persons. Corroboration as to the participation of one of the accused in the crime cannot be regarded as corroboration against all the accused. In *Reg* v. *Jenkins*[8], Mr. Baron Alderson said : "When there is one witness of bad character giving evidence against both prisoners, a confirmation of his testimony with regard to one is no confirmation of his testimony with reference to the other. If, therefore, you find there is corroboration applicable to one prisoner, take it as against him ; but unless it exists with regard to both it would be unjust to give it a general effect." In *Rex* v. *Stubbs*[3], Jervies, C.J., added that where an accomplice accuses two persons and is corroborated only as regards one of them the jury ought to be advised to acquit the other, inasmuch as "the accomplice may speak truly to all the facts of the case and at the same time in his evidence substitute the other person for himself in his narrative of the case." See also *Rex* v. *Morris and another*[9].

The corroboration of the accomplice must be by testimony of an independent witness. One accomplice cannot corroborate another, *Rex* v. *Noakes*[10], *Rex* v. *Baskerville*[7]. For otherwise two companions in guilt might get off by confessing and falsely accusing two innocent persons, particularly as under the English law the grant of pardon is absolute and is not conditioned on the veracity of the statement made by the approver. This again is only a prinnciple of prudence. For it may well be that the accomplices are apprehended at different places separated by long distances from each other and each of them gives a similar version as to the persons associated with them in the crime and the statements are made

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1. (1908) 2 K.B. 680.
2. (1836) 7 C. & P. 272.
3. (1855) 25 L. J. Reports, Magistrates' Cases 16.
4. Russell on Crimes, 7th Edn., Vol. 2, p. 2287.
5. (1836) 8 C. & P. 107.
6. (1836) 8 C. & P. 732.
7. (1916) 2 K.B. 658 (C.C.A.).
8. (1845) 1 Cox. C.C. 177.
9. (1836) 7 C. & P. 270.
10. (1832) 5 C. & P. 326.

in circumstances excluding any suggestion of concert or collusion, in which case it would be rather difficult to hold that the statements cannot corroborate each other.

Though English Criminal Jurisprudence has undoubtedly influenced the development of criminal law in the other parts of the Commonwealth the English cautionary rule of practice in regard to the testimony of accomplices with all its ramifications and restated as above in *Baskerville's case*[1] has not been adopted uniformly. In South Africa and the neighbouring British Protectorates for instance, the cautionary rule followed is somewhat different. The position fell to be considered by the Judicial Committee in two recent appeals from Basutoland, *Tumahole Bereng* v. *The King*[2], and *Bereng Griffith Lerotholi* v. *The King*[3]. In both cases the question involved related to the interpretation and application of section 231 of the Basutoland Criminal Procedure and Evidence Proclamation, 1938, as amended by section 1 of the Basutoland Criminal Procedure and Evidence (Amendment) Proclamation, 1944. Both were cases of alleged ritual murder. In both the conviction had rested on the testimony of an accomplice. Section 231 states: "Any Court which is trying any person on a charge of any offence may convict him of any offence alleged against him in the indictment or summons on the single evidence of any accomplice: Provided that the offence has, by competent evidence, other than the single and unconfirmed evidence of the accomplice, been proved to the satisfaction of such Court to have been actually committed." It falls to be noted that under this provision it is the commission of the offence that is to be established by evidence *aliunde* and not the connection of the accused with the offence. In *Tumahole's case*[2], there was no evidence sufficient to confirm the accomplices in proving or proving *aliunde* that the deceased person had been murdered. The finding was so stated by Lord MacDermott who delivered the judgment of the Privy Council. His Lordship then went on to observe: "This is enough to dispose of the appeal, but their Lordships think it right to refer to two further matters which it raised and which are of importance in the administration of criminal justice in the Territory. The first of these relates to the cautionary rule of English practice emphasising the dangers of acting on accomplice evidence (be it that of one or more accomplices) which is uncorroborated in some material respect implicating the accused. It was not suggested that this rule of practice was alien to the conduct of criminal proceedings in Basutoland or that it had been ousted by the provisions of section 231." The suggestion is clear that according to the Privy Council the cautionary rule of practice regarding accomplice evidence observed in England as stated in the *Baskerville's case*[1] would be applicable to the Basutoland Territory. But as a matter of fact it was a different cautionary rule, the one followed in South Africa, that had been observed there in practice uniformly. The cautionary rule of practice observed in the Union of South Africa was stated by Schreiner, J.A., in *Rex* v. *Ncanana*[4] as follows: "The cautious Court or jury will often properly acquit in the absence of other evidence implicating the accused with the crime but no rule of law or practice requires it to do so. What is required is that the trier of fact should warn himself, or, if the trier is a jury, that it should be warned of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth. This special danger is not met by corroboration of the accomplice in material respects not implicating the accused by proof *aliunde* that the crime charged was committed by some one; so that satisfaction of the requirements of section 285 (in the South African Act corresponding to section 231 in the Basutoland Proclamation) does not sufficiently protect the accused against the risk of false incrimination by an accomplice. The risk that he may be convicted wrongly although section 285 has been satisfied will be reduced, and in the most satisfactory way, if there is corroboration implicating the accused. But it will also be reduced if the accused

1. (1916) 2 K.B. 658 (C.C.A.).
2. (1949) A.C. 253 (P.C.).
3. (1950) A.C. 11 (P.C.).
4. (1948) 4 S.A.L.R. 399, 405.

shows himself to be a lying witness or if he does not give evidence to contradict or explain that of the accomplice. And it will also be reduced even in the absence of these features, if the trier of fact understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is in such circumstances only permissible where the merits of the former as a witness and the demerits of the latter are beyond question. In *Bereng Griffith Lerotholi's case*[1], it was contended that inasmuch as in Basutoland the South African cautionary rule of practice had been followed the suggestion in *Tumahole's case*[2] that the English cautionary rule would be applicable was not correct. The contention was accepted and it was held that once it was proved by independent evidence or confirmatory evidence that the offence had been committed the accused may be convicted on the strength of the accomplice evidence alone. Though both in England and South Africa an accused can go into the witness-box and testify, the cautionary rule of practice in regard to evidence of accomplices is different in the two countries.

In India an accused person cannot testify. An accomplice is however a competent witness under section 133 of the Evidence Act. But he is not worthy of credit as pointed out by illustration (*b*) to section 114. Still, as in English law, a conviction based on the uncorroborated testimony of an accomplice is not illegal (section 133). In addition to these provisions relating to accomplice evidence, section 30 enacts that when more persons than one are being tried jointly for the same offence and a confession made by one of such persons affecting himself and some other of such persons is proved the Court may take into consideration such confession as against such other person also. In spite of the fact that in India accomplice evidence is covered by statutory provisions it has been held that the English cautionary rule of practice in the matter would be equally applicable in this country. There seems to be in effect no difference whatsoever between English and Indian law in the matter of accomplice evidence, *R.* v. *Elahee Baksh*[3]. In *Ambica Charan* v. *Emperor*[4], it was observed by Sir George Rankin, C.J.: "The broad principle upon which the English practice has always proceeded is as plain and necessary as it ever was. Corroboration ought to consist of some circumstance that affects the identity of the person accused. As an English case puts it, a man who has been guilty of a crime himself will always be able to relate the facts of the case, and, if the confirmation be only of the truth of that history without identifying the person there is no corroboration at all". In *Mahadeo* v. *The King*[5], in holding that accomplice evidence should be confirmed in some material circumstance concerning the crime as well as in regard to the accused's implication therein and that one accomplice cannot corroborate another, the principles laid down in *Baskerville's case*[6] were referred to and followed. Sir Sidney Rowlatt who delivered the judgment of the Judicial Committee stated: "It is well settled that the evidence of an accessory, which Sukraj plainly was on his own showing, must be corroborated in some material particular not only bearing upon the facts of the crime but upon the accused's implication in it and further that evidence of one accomplice is not available as corroboration of another (*The King* v. *Baskerville*)[6]. This rule as to corroboration as was pointed out in the case just cited, long a rule of practice, is now virtually a rule of law, and in a case like the present it is a rule of the greatest possible importance, the position being that there are three persons all implicated in the crime and one of them or two of them exculpates himself or themselves by fastening the guilt upon the other". Reading the provisions in section 133 and section 114, illustration (*b*) of the Evidence Act, Sir John Beaumont observed in the recent decision of the Privy Council in *Bhuboni Sahu* v. *The King*[7]: "The Courts in India have held that whilst it is not illegal to act upon the uncorroborated evidence of an accomplice, it is a rule of prudence so universally followed as to amount almost to a rule of law that it is unsafe to act upon the evidence of an accomplice

1. (1950) A.C. 11 (P.C.).
2. (1949) A.C. 259 (P.C.).
3. (1866) 5 W.R. Cr. 80 (F.B.).
4. (1931) 35 C.W.N. 1270: A.I.R. 1931 Cal. 697 (S.B.).
5. (1936) 40 C.W.N. 1164: A.I.R. 1936 P.C. 242 (P.C.).
6. (1916) 2 K.B. 658 (C.C.A.).
7. (1949) 2 M.L.J. 194: L.R. 76 I.A. 147 (P.C.).

unless it is corroborated in material respects so as to implicate the accused; and further that the evidence of one accomplice cannot be used to corroborate the evidence of another accomplice. The law in India, therefore, is substantially the same on the subject as the law in England, though the rule of prudence may be said to be based upon the interpretation placed by the Courts on the phrase 'corroborated in material particulars' in illustration (*b*) to section 114".

It is however useful to remember that the degree of suspicion attaching to an accomplice's testimony depends upon the extent and nature of his complicity. This will be a factor bearing upon the amount of corroboration that may be needed. In *Kamalakhan* v. *Emperor*[1], Sir John Beaumont, C.J., stated: "The objections which usually arise to the evidence of an accomplice do not really apply where the alleged accomplice, that is, the person who pays the bribe is not a willing participant in the offence but is really a victim of that offence. This statement was approved by the Judicial Committee in *Srinivas Mall* v. *Emperor*[2] where it was observed: "No doubt the evidence of accomplices ought as a rule to be regarded with suspicion. The degree of suspicion which will attach to it must, however, vary according to the extent and nature of the complicity: sometimes as was said by Sir John Beaumont, C. J., in *Kamalakhan* v. *Emperor*[1], the accomplice is not a willing participant in the offence but a victim of it. There is ground for saying that the accomplices in this case acted under a form of pressure which it would have required some firmness to resist". In *Narayan Prasad* v. *Emperor*[3] it was held that the rule requiring corroboration of accomplice's evidence as against an accused, if it applies at all, applies with very little force to a case in which the accused is charged with extorting a bribe from other persons, and that where payment of the bribe was not voluntary, very slight corroboration would be sufficient to make the evidence of such persons admissible against the receiver of the bribe.

While it has been repeatedly recognised that one accomplice cannot ordinarily corroborate another, a somewhat different reception has been accorded by some decisions to the confessions of a co-accused. In In re *Rajagopal*[4], it was held that the confession of the co-accused can be accepted as corroboration of the approver's evidence in the case. The conclusion was rested on the provisions of section 30 of the Evidence Act. In *Thyagaraja Bhagavathar's case*[5], this view was approved and it was pointed out that if the English law on this matter was different from the Indian law it was because of the absence of a provision in English law corresponding to section 30 of the Evidence Act. But this position is no longer tenable in view of the observations of the Privy Council in *Bhuboni Sahu* v. *The King*[6]. There it was held that the confession of a co-accused can be used only in support of other evidence and cannot be made the foundation of a conviction and though a conviction founded upon the testimony of an accomplice supported only by the confession of a co-accused may be justified in law under section 133, yet Courts should be slow to depart from the rule of prudence based on long experience which requires some independent evidence implicating the particular accused. The implications of section 30 were fully examined and Sir John Beaumont observed: "This section was introduced for the first time in the Evidence Act of 1872, and marks a departure from the common law of England. . . . . Section 30 seems to be based on the view that an admission by an accused person of his own guilt affords some sort of sanction in support of the truth of the confession as against others as well as himself. But a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of 'evidence' contained in section 3 of the Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver which is not subject to any of these infirmities. Section 30, however, provides that the Court may take the confession into consideration and thereby makes it no doubt evidence on which the Court may act; but the section does not say that the confession is to

1. (1935) I.L.R. 59 Bom. 486.
2. (1947) I.L.R. 26 Pat. 460 (P.C.).
3. I.L.R. (1948) Nag. 276.
4. (1943) 2 M.L.J. 634: I.L.R. (1944) Mad. 308 (F.B.).
5. (1946) 1 M.L.J. 42: I.L.R. (1946) Mad. 389.
6. (1944) 2 M.L.J. 194: L.R. 76 I.A. 147 (P.C.).

amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put in the scale and weighed with the other evidence. Their Lordships think that the view which has prevailed in most of the High Courts in India, namely, that the confession of a co-accused can be used only in support of other evidence and cannot be made the foundation of a conviction is correct. . . . . . Sir Valentine Holmes has relied strongly on the case in In re *B. K. Rajagopal*[1] in which the Court founded a conviction upon the evidence of an accomplice supported only by the confession of a co-accused. Their Lordships whilst not doubting that such a conviction is justified in law under section 133 of the Evidence Act and whilst appreciating that the coincidence of a number of confessions of co-accused all implicating the particular accused, given independently and without an opportunity of previous concert, might be entitled to great weight, would nevertheless observe that Courts should be slow to depart from the rule of prudence based on long experience, which requires some independent evidence implicating the particular accused. The danger of acting upon accomplice evidence is not merely that the accomplice is on his own admission a man of bad character who took part in the offence and afterwards to save himself betrayed his former associates, and who has placed himself in a position in which he can hardly fail to have a strong bias in favour of the prosecution; the real danger is that he is telling a story which in its general outline is true, and it is easy for him to work into the story matter which is untrue. He may implicate ten people in an offence, and the story may be true in all its details as to eight of them, but untrue as to the other two, whose names are introduced because they are enemies of the approver. . . . *The only real safeguard against the risk of condemning the innocent with the guilty lies in insisting upon independent evidence which in some measure implicates each accused*" (italics ours). The extent to which the confession of a co-accused can be taken as affording corroboration of accomplice evidence was considered very recently by the Madras High Court in In re *Padmaraja Shetty*[2]. The learned Judges stated: "The confession of a co-accused cannot in our view afford better or more reliable evidence than that of an accomplice. If an accomplice's evidence is tainted evidence, the confession of a co-accused is also tainted evidence. Section 30 of the Indian Evidence Act does not compel a Court to accept the confession of a co-accused as corroboration of the approver's evidence. It only empowers the Court to take into consideration such confession as against the person jointly tried with him or against the person who makes such a confession. Though an accomplice's evidence is legal evidence and is not excluded by any of the provisions of the Evidence Act it has been held that as a rule of practice such evidence should not be accepted as corroborative evidence. The same principle should apply in the case of a confessional statement".

The rule in *Baskerville's case*[3] is simple and clear. It is a rule of prudence. The decision in *Bhuboni Sahu's case*[4] is a valuable supplement as to the Indian law. Together they afford a clear lead regarding the extent and nature of the corroboration of the testimony of an accomplice. The needed corroboration is sought in different directions in different countries. In England, it is to be by independent evidence in relation to the participation of the particular accused. In the Union of South Africa, the failure of the accused to testify in his cause or disbelief of his evidence may furnish the necessary corroboration. Indian practice has followed the cautionary rule observed in England, and, according to the Privy Council, a basis for it may be sought in the interpretation placed by the Courts on the phrase "corroborated in material particulars" occurring in illustration (*b*) to section 114 of the Evidence Act. Such corroboration is not however to be sought in the testimony of another accomplice or in the confession of a co-accused. Also the degree of corroboration required would depend on the nature and extent of the complicity of the approver.

S. VENKATARAMAN.

1. (1943) 2 M.L.J. 634: I.L.R. (1944) Mad. 308 (F.B.).
2. (1949) 2 M.L.J. 428.
3. (1916) 2 K.B. 658 (C.C.A.).
4. (1949) 2 M.L.J. 194: L.R. 76 I.A. 147 (P.C.).